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No. 1507

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

CLYDE A. PERKINS, *Petitioner,*

v.

STANDARD OIL COMPANY OF CALIFORNIA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

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OCTOBER TERM, 1969

No.

CLYDE A. PERKINS, *Petitioner,*

v.

STANDARD OIL COMPANY OF CALIFORNIA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Clyde A. Perkins petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this cause on January 22, 1970.

OPINION BELOW

The opinion of the court of appeals is not officially reported; it is printed as Appendix A, *infra*, pp. 1a-2a. The opinion of the United States District Court for the District of Oregon in a related cause involving

the same parties and the same issue is printed as Appendix C, *infra*, pp. 10a-12a.

JURISDICTION

The judgment of the court of appeals was entered January 22, 1970 (App. 1a). On April 20, 1970, by order of Mr. Justice Douglas, the time for filing a petition for a writ of certiorari was extended to and including May 1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

This is a private antitrust action in which the jury returned a substantial verdict in favor of the plaintiff (petitioner herein); the court of appeals set aside that verdict and the district court's judgment; and this Court reversed and remanded the case to the district court with instructions that the jury's verdict and judgment be reinstated. The question is whether the court of appeals erred in ruling that the lower federal courts lack jurisdiction to entertain an application, under Section 4 of the Clayton Act, for attorneys' fees covering the legal services performed in this Court, absent an express direction to that effect in the Court's mandate.

STATUTE INVOLVED

Section 4 of the Clayton Act, 38 Stat. 731, 15 U.S.C. § 15, provides in pertinent part as follows:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

STATEMENT

This case is a sequel to *Perkins* v. *Standard Oil Co. of California*, 395 U.S. 642 (1969). The original action was commenced in 1959 by petitioner Clyde A. Perkins who sued respondent Standard Oil Company of California ("Standard") to recover treble damages for injuries from Standard's price and price-related discriminations against him in violation of Sections 2(a), (d) and (e) of the Clayton Act, 15 U.S.C. §§ 13 (a), (d), (e). After a protracted trial the jury returned a verdict for petitioner; it assessed $336,404.57 in actual damages against Standard; and the district court trebled the award pursuant to Section 4 of the Clayton Act, 15 U.S.C. § 15. The court then held a separate hearing on attorneys' fees and awarded Perkins an additional $289,000 for legal services performed through the end of the trial.

On appeal, the United States Court of Appeals for the Ninth Circuit reversed the district court's judgment and remanded the entire case for a new trial. 396 F.2d 809. This Court granted certiorari, 393 U.S. 1013, and, on June 16, 1969, reversed the judgment of the Ninth Circuit and remanded the case to the United States District Court for the District of Oregon with instructions to reinstate the jury verdict and enter judgment for petitioner, 395 U.S. 642, 650. This Court ruled that the court of appeals' rationale for setting aside the jury verdict "is wholly an artificial one and is completely unwarranted by the language or purpose of the [Robinson-Patman] Act." *Id.*, at 647.[1]

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[1] All seven participating Members of the Court voted to reverse the judgment of the Ninth Circuit. Mr. Justice Marshall and Mr. Justice Stewart dissented from the decision to reinstate the jury verdict. *Id.*, at 650.

The district court entered judgment reinstating the jury verdict on October 27, 1969. That judgment has been satisfied by Standard.

Following this Court's decision Perkins filed in the district court an application for attorneys' fees, pursuant to Section 4 of the Clayton Act, for the legal services performed during the appellate stages of this litigation, both in the Ninth Circuit and the Supreme Court. The district court denied the application, ruling that it "should have been made to the appellate courts," for allowance of appellate attorneys' fees "is a matter within the discretion of the appellate courts" (App. 11a-12a). The court reasoned that it had no jurisdiction to consider the application "in the absence of an express direction in the mandate that such matter should be considered as part of the costs" (App. 12a). Perkins' appeal to the Ninth Circuit from the district court's ruling is presently pending.

Simultaneously with that appeal Perkins filed in the court of appeals two separate applications for attorneys' fees for the legal services performed in the Ninth Circuit and the Supreme Court.[2] This petition for certiorari is filed to review the Ninth Circuit's denial of the application covering the legal services performed in this Court. In its order denying that application the Ninth Circuit stated (App. 1a):

> The mandate of the Supreme Court was specific: it reinstated the district court judgment and further ordered that Perkins was to have costs. These were enumerated both as to item and amount, and consisted of clerk's fees and expenses incurred by Perkins for printing the record in the Supreme Court on certiorari. Nothing else was included.
>
> Although a request for attorneys' fees may not have been presented to the Supreme Court, we

[2] These applications were filed to protect Perkins' right to a hearing before some tribunal in light of the district court's ruling that appellate courts should award appellate attorneys' fees.

nevertheless believe that neither we nor the district court can now consider that matter. This addition, in our opinion, would constitute an impermissible modification of the Supreme Court's mandate.[3]

REASONS FOR GRANTING THE WRIT

This case presents a novel question of great importance in the proper interpretation of Section 4 of the Clayton Act, the private treble-damage provision. That section provides that a successful plaintiff—*i.e.*, a person injured in his business or property by reason of anything forbidden in the antitrust laws—is entitled to recover not only treble-damages, but "a reasonable attorney's fee" as well. And it has long been settled that in computing the amount of the allowable attorney's fee, services performed on appeal are to be considered in addition to those performed at trial. *American Can Co.* v. *Ladoga Canning Co.*, 44 F.2d 763, 772 (7th Cir. 1930), *cert. denied*, 282 U.S. 899 (1931); *Trans World Airlines* v. *Hughes*, 1970 Trade Cases ¶ 73,142, p. 88,487 (S.D.N.Y. 1970).

Despite the settled law Perkins has been unable to obtain a hearing on his applications for attorneys' fees covering the legal services performed for him in this Court—services which resulted in reinstatement of a jury verdict improperly set aside by the Ninth Circuit. As the affidavits reprinted in Appendix B, *infra*, pp. 3a-4a, 6a, 8a-9a, demonstrate, Perkins' lawyers

[3] The court's order was signed by the same panel which heard Standard's original appeal in this case and set aside the jury verdict (App. 2a). In the order the Ninth Circuit also disposed of Perkins' application for attorneys' fees for the services performed before it, awarding him $2,500.00 (*ibid.*); those services consumed over 1,600 hours (App. 4a-5a, 7a-8a). We are not seeking review of this portion of the Ninth Circuit's order.

expended over 2,800 hours in preparing and presenting the case to this Court. He paid a fee in excess of $176,000 to the lawyers principally responsible for handling the litigation at that stage. *Id.*, at 9a.

In denying Perkins' application for an award of attorneys' fees covering those services, the Ninth Circuit ruled that, absent an express direction in the mandate of this Court, "neither [it] nor the district court can now consider. . . . Perkins' application for Supreme Court attorneys' fees" (App. 1a-2a). That decision, if permitted to stand, will seriously obstruct the right of plaintiffs in private antitrust actions to obtain awards of attorneys' fees "reasonabl[y]" compensating them for all the legal services necessary to recover their damages—thereby undercutting one of the central purposes of Section 4 of the Clayton Act. Although the precise question presented here has never to our knowledge been passed upon by any other court, the decision below conflicts with the result in the *Osborn* series of cases where appellate attorneys' fees were awarded by the district court on remand without an express direction from the reviewing court, *Osborn* v. *Sinclair Refining Co.*, 171 F.Supp. 37 (D. Md. 1959), 286 F.2d 832 (4th Cir. 1960), *cert. denied*, 366 U.S. 963 (1961), 207 F.Supp. 856 (D. Md. 1962). *Cf. Trans World Airlines* v. *Hughes*, 332 F.2d 602 (2nd Cir. 1964), *cert. dismissed as improvidently granted*, 380 U.S. 248, 249 (1965), 1970 Trade Cases ¶73,142 (S.D.N.Y. 1970).

The requirement of the decision below—that this Court's mandate must include a direction for an award of appellate attorneys' fees—misconstrues the meaning and effect of the mandate. In antitrust cases where

this Court has reinstated a judgment improperly set aside by a court of appeals, the Court, so far as we are aware, uniformly has not mentioned attorneys' fees in its mandate. See *Hanover Shoe, Inc.* v. *United Shoe Mach. Corp.*, 392 U.S. 481 (1968), Nos. 335 & 463, O.T. 1967 (mandate dated June 17, 1968); *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946), No. 444, O.T. 1945 (mandate dated February 25, 1946). This practice comports with the long established rule that the mandate only resolves questions which were, or should have been, raised in this Court. It does not resolve any other questions. As the Court observed in *Ex parte Union Steamboat Co.*, 178 U.S. 317, 319 (1900):

> The inferior court is justified in considering and deciding any question left open by the mandate and opinion of this court . . . .

To the same effect are *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255-56 (1895); *Banco Nacional de Cuba* v. *Farr*, 383 F.2d 166, 177 (2nd Cir. 1967).

The silence of the mandate in the instant case on the question of attorneys' fees (see App. 13a) can only reasonably be interpreted as leaving open the matter for further consideration by the district court to which the mandate was directed. Perkins had no right to apply for any appellate attorneys' fees until this Court's judgment was entered. At the time his petition for certiorari and briefs were filed he had no award of damages in his favor. And an application for attorney's fees is only proper " 'as an incident to a *successful* prosecution . . . for . . . damages based on a violation of the anti-trust laws.' " *Talon, Inc.* v.

Union Slide Fastener, Inc., 266 F.2d 731, 739 (9th Cir. 1959) (emphasis added), quoting *Alden-Rochelle, Inc.* v. *ASCAP*, 80 F.Supp. 888, 899 (S.D.N.Y. 1948); see also, *Clabaugh* v. *Southern Wholesale Grocers' Ass'n*, 181 Fed. 706, 708 (5th Cir. 1910); *Gillam* v. *A. Shyman, Inc.*, 205 F.Supp. 534, 535 (D. Alaska 1962).[4]

The error of the decision below is underscored, finally, by the consequences which would result from permitting it to stand. This Court would have to entertain, as original matters, applications for attorneys' fees for services performed before it. The Court could either remand those applications to the lower courts or rule upon them. The former alternative would turn the entire procedure into a meaningless formality, and the latter would impose upon the Court a task properly residing in the district courts.[5]

One remaining point should be mentioned. Petitioner considers the district court—in which he first applied for Supreme Court attorneys' fees (see the Statement, *supra*, p. 4)—the proper forum to conduct a hearing and rule upon that application. The subsequent application in the Ninth Circuit (which is the subject of this petition) was filed in response to the district court's refusal to entertain the matter, and it

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[4] The cases where courts of appeals have awarded or denied attorneys' fees in conjunction with affirmances of antitrust judgments (see citations at App. 2a fn. 1, 11a-12a) have no bearing on the question presented here. In each, the plaintiff had a judgment in his favor both before and after the ruling of the appellate court which passed upon the question of appellate attorneys' fees.

[5] "The general rule is that the fixing of counsel fees in an antitrust action is within the discretion of the trial court, 'reasonably exercised'. *Montague & Co.* v. *Lowry*, 193 U.S. 38, 48 (1904)." *TWA* v. *Hughes*, 1970 Trade Cases, *supra* at p. 88,486.

was filed solely to protect Perkins' right to a hearing in some court should the district court's judgment ultimately be sustained.

Petitioner's appeal to the Ninth Circuit from the district court's judgment is still pending. Since the Ninth Circuit's order denying the application filed with it applied in terms to both "we [the Ninth Circuit]" and "the district court" (App. 1a), there is little reason to expect a reversal of the district court's judgment. However, should the court of appeals rule in Perkins' favor on his appeal and remand the case to the district court with instructions to conduct a hearing on his request for attorneys' fees covering the legal services performed in this Court, Perkins will move to dismiss this case when the time for review of that ruling has elapsed. On the other hand, should the Ninth Circuit affirm the district court, Perkins intends to file a petition for a writ of certiorari seeking review of that affirmance. Perkins intends to file an application for attorneys' fees with this Court only if it is finally decided that neither the court of appeals nor the district court has jurisdiction to entertain such an application.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 1970

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 19436

STANDARD OIL COMPANY OF CALIFORNIA, a Corporation,
Appellant,

v.

CLYDE A. PERKINS, *Appellee.*

Order on Application for Attorneys' Fees

FILED JAN. 22, 1970
WM. B. LUCK, *Clerk*

On Standard's appeal from the district court judgment for Perkins in his Clayton Act suit against Standard, we reversed and ordered a new trial. However, the Supreme Court, on certiorari, reversed this court and directed the district court to reinstate its judgment.

Perkins has now applied to this court to allow attorneys fees for the services of his lawyers, both in the Supreme Court and in this court on the appeal; he proposes alternatively that we direct the district court to act.

The mandate of the Supreme Court was specific; it reinstated the district court judgment and further ordered that Perkins was to have costs. These were enumerated both as to item and amount, and consisted of clerk's fees and expenses incurred by Perkins for printing the record in the Supreme Court on certiorari. Nothing else was included.

Although a request for attorneys' fees may not have been presented to the Supreme Court, we nevertheless believe that neither we nor the district court can now consider that matter. This addition, in our opinion, would constitute an impermissible modification of the Supreme Court's man-

date. As stated in *Briggs* v. *Penn. R. Co.*, 334 U.S. 304, 306 (1948), "In its earliest days this Court consistently held that an inferior court has no power or authority to deviate from the mandate issued by an appellate court. (citations omitted). The rule of these cases has been uniformly followed in later days; . . . ." See also *Skeogh* v. *Ottly*, D.C. Virgin Islands, 278 F. Supp. 314 (1968). We reject Perkins' application for Supreme Court attorneys' fees.

Turning to the companion application, we note that this court's amended judgment contains a reservation of jurisdiction to make Perkins an allowance for the services of his attorneys in this court should be eventually prevail. This provision is consistent with our general practice to act upon such applications instead of referring them to the trial court for determination.[1] We perceive no good reason in this instance to deviate from that practice.

We conclude that $2500.00 is a reasonable sum for the services rendered in this court by Perkins' attorneys on his appeal and that an award in that amount should be made.

IT IS SO ORDERED.

FREDERICK G. HAMLEY
United States Circuit Judge

M. OLIVER KOELSCH
United States Circuit Judge

BEN. C. DUNIWAY
United States Circuit Judge

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[1] Twentieth Century Fox Film Corp. v. Goldwyn, 328 F.2d 190 (9th Cir. 1964); American Crystal Sugar Co. v. Mandeville Island Farms, 195 F.2d 622 (9th Cir. 1952); Rangen, Inc. v. Sterling Nelson & Sons, 351 F.2d 851 (9th Cir. 1965). Where, however, we have directed further proceedings, we have on occasion referred this matter to the district courts. United States v. Carter, 272 F.2d 363 (9th Cir. 1959).

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 19436

STANDARD OIL COMPANY OF CALIFORNIA, a Corporation,
Appellant,

v.

CLYDE A. PERKINS, *Appellee*.

Affidavit of Bruce M. Hall in Support of Request for Additional Attorneys' Fees on Appeal to the Supreme Court of the United States

STATE OF OREGON
COUNTY OF MULTNOMAH } ss.

I, BRUCE M. HALL, being first duly sworn, depose and state as follows:

I.

I have been a partner in the law firm of Rives, Bonyhadi & Hall since January 1, 1968. Prior thereto I was a partner in the law firm of Bonyhadi & Hall. Ernest Bonyhadi and I have done the principal work in behalf of our law firm in this case.

II.

On May 14, 1964, the United States District Court for the District of Oregon made an award of attorneys' fees for services which had been rendered in that Court up to that date. No subsequent award has been made to plaintiff for services incurred after May 14, 1964, which period includes the appeals to this Court and to the Supreme Court of the United States.

III.

The services performed by Ernest Bonyhadi and myself in connection with the appeal to the Supreme Court of the United States consisted of preparation of the petition for certiorari, the brief of petitioner, and the reply briefs, which were filed with the Supreme Court. The preparation of the foregoing material required close liaison between the firm of Rives, Bonyhadi & Hall, and that of Tilbury & Kane and Arent, Fox, Kintner, Plotkin & Kahn of Washington, D. C., co-counsel.

IV.

There were conservatively 509 hours logged by Ernest Bonyhadi and myself in connection with the work before this Court.

/s/ Bruce M. Hall
Bruce M. Hall

Subscribed and sworn to before me this 2nd day of December, 1969.

Stephanie Slater
Notary Public for Oregon

My Commission expires: 1/23/71

[same caption]

Affidavit of Bruce M. Hall in Support of Request for Additional Attorneys' Fees on Appeal to the Ninth Circuit Court of Appeals

State of Oregon)
County of Multnomah) ss.

I, Bruce M. Hall, being first duly sworn, depose and state as follows:

I.

I have been a partner in the law firm of Rives, Bonyhadi & Hall since January 1, 1968. Prior thereto I was a partner

in the law firm of Bonyhadi & Hall. Ernest Bonyhadi and I have done the principal work in behalf of our law firm in this case.

II.

On May 14, 1964, the United States District Court for the District of Oregon made an award of attorneys' fees for services which had been rendered in that Court to that date. No subsequent award has been made to plaintiff for services incurred after May 14, 1964, which period includes the appeals to this Court and to the Supreme Court of the United States.

III.

The services performed by Ernest Bonyhadi and myself in connection with Standard's appeal to this Court consisted of preparation, in consultation with Roger Tilbury, co-counsel for plaintiff, of appellee's brief, the appendix to appellee's brief, brief in support of plaintiff's motion for rehearing and for clarification of this Court's opinion, and the reply brief in support of plaintiff's motions.

IV.

There were conservatively 812 hours logged by Ernest Bonyhadi and myself in connection with the work before this Court.

/s/ Bruce M. Hall
Bruce M. Hall

Subscribed and sworn to before me this 2nd day of December, 1969.

Stephanie Slater
Notary Public for Oregon

My commission expires: 1/23/71

[same caption]

Affidavit of Roger Tilbury in Support of Request for Additional Attorneys' Fees on Appeal to the Supreme Court of the United States

STATE OF OREGON }
COUNTY OF MULTNOMAH } ss.

I, Roger Tilbury, being first duly sworn, on oath depose and say as follows:

I.

As one of the attorneys for Clyde Perkins, I assisted in the preparation of the petition for certiorari, the brief of petitioner, and the reply briefs, which were filed with the Supreme Court, and I was present during the oral argument.

II.

The preparation of such briefs required close liaison between my firm and the firms of Rives, Bonyhadi and Hall, Portland, Oregon, and Arent, Fox, Kintner, Plotkin and Kahn, of Washington, D. C. This necessitated five trips on my part to Washington, D. C. and forty days out of my office.

III.

Very conservatively, I spent 405 hours in doing this work for submission to the Supreme Court.

/s/ ROGER TILBURY
Roger Tilbury

Subscribed and sworn to before me this 28th day of November, 1969.

FLORENCE M. SCUDDER
Notary Public for Oregon

My commission expires: 8-5-72

[same caption]

Affidavit of Roger Tilbury in Support of Request for Additional Attorneys' Fees on Appeal to the Ninth Circuit Court of Appeals

STATE OF OREGON }
COUNTY OF MULTNOMAH } ss.

I, Roger Tilbury, being first duly sworn, on oath depose and say as follows:

I.

Since November 1958, it has been my privilege to have served as one of the attorneys for Clyde Perkins in connection with this case. I am a partner in the firm of Tilbury & Kane, have practiced law for nineteen years and am admitted to practice before the United States Supreme Court, and the Courts of Appeals for the Fifth, Eighth, Ninth, Tenth and District of Columbia Circuits, inter alia.

II.

The United States District Court for the District of Oregon on May 14, 1964, made an award for attorneys' fees for services which had been rendered in that court, up to that date. No subsequent award has been made for any of the services following May 14, 1964, which included appeals to this court and to the Supreme Court.

III.

My services in connection with Standard's appeal to this court consisted of the presentation of the oral argument and assisting in the preparation of appellee's brief, the appendix to appellee's brief, a brief in support of our motion for hearing and for clarification of the opinion, and a reply brief in support of our motion. These briefs were necessarily lengthy and complex (418 pages in all) in order to respond to the even longer briefs filed by Standard (829 pages, including appendix).

IV.

Very conservatively, I spent 810 hours in doing this work for submission to this court.

/s/ ROGER TILBURY
Roger Tilbury

Subscribed and sworn to before me this 28th day of November, 1969.

FLORENCE M. SCUDDER
Notary Public for Oregon
My commission expires: 8-5-72

[same caption]

On Application for Additional Attorneys' Fees in Connection With Review by the Supreme Court of the United States

Affidavit of Earl W. Kintner

WASHINGTON, DISTRICT OF COLUMBIA } ss.

I, Earl W. Kintner, having first been duly sworn, depose and say:

I.

I am a member of the law firm of Arent, Fox, Kintner, Plotkin & Kahn. Prior to joining this firm in 1961, I was with the Federal Trade Commission for thirteen years, including six years as General Counsel and two years as Chairman. I have specialized in antitrust matters during most of my professional career.

II.

In July, 1968, I undertook to represent Mr. Clyde A. Perkins in seeking review by the United States Supreme Court of the judgment of this Court in the above-entitled

cause. Several lawyers associated with the firm worked with me on this matter, the two principal ones being Stephen S. Mayne and George R. Kucik. Mr. Kucik will be a member of the firm as of January 1, 1970.

III.

I was the lawyer principally responsible for handling this matter before the Supreme Court. In connection therewith my associates and I (in conjunction with Ernest Bonyhadi, Bruce M. Hall and Roger Tilbury) prepared a petition for a writ of certiorari, a reply brief, a brief on the merits and another reply brief. We also designated and prepared the record for printing, and Mr. Kucik and I presented the oral argument before the Supreme Court.

IV.

We expended 1,935.6 hours in performing the above services. The non-contingent sum paid to the firm by Mr. Perkins for this work was $58,068 (1,935.6 hours x $30.00). For appellate work of this nature, our hourly fees are substantially greater. In this instance our total fee, based upon the agreed upon hourly rate plus a contingency, was $176,772.00.

/s/ Earl W. Kintner
Earl W. Kintner

Sworn to and subscribed before me this 4th day of December, 1969.

Frances B. Crown
Notary Public

My Commission Expires Feb. 28, 1970

[Notarial Seal]

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

No. 369-59

CLYDE PERKINS, *Plaintiff*

v.

STANDARD OIL COMPANY OF CALIFORNIA, a corporation, *Defendant*

Memorandum Opinion

BELLONI, Judge.

This matter is before the court on plaintiff's application for additional attorneys fees pursuant to 15 USC § 15.

In 1959 Plaintiff brought a civil anti-trust action against defendant seeking treble damages under the Clayton Act as amended by the Robinson Patman Act. In 1963 he recovered a judgment in the amount of $1,298,213.71. This amount included an award of $289,000.00 attorneys fees.

The matter was appealed and the United States Court of Appeals for the Ninth Circuit ordered a new trial. That court did not award additional attorneys fees on appeal.

The Supreme Court granted certiorari. It reversed the judgment of the Court of Appeals and ordered that the verdict and judgment of the jury be reinstated. The mandate reads, in part, as follows:

> "ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the said United States Court of Appeals in this cause be, and the same is hereby, reversed with costs; and that this cause be and the same is hereby, remanded to

the United States District Court for the District of Oregon with directions to reinstate its judgment.

It is further ordered that the said petitioner, Clyde A. Perkins, recover from the Standard Oil Company of California Ten Thousand Nine Hundred and Sixty Dollars and Fifty-nine Cents ($10,960.59) for his costs herein expended.

June 16, 1969

Clerk's costs	$ 150.00
Printing of record	10,810.59
Total	$10,960.59"

The Supreme Court does not, in its opinion or its mandate, award attorneys fees.

The questions raised by plaintiff in his present application are as follows:

(1) Is Plaintiff enfitled to an attorneys fee on appeal

(2) If so, which court is the proper court to award such fee, and

(3) What type of hearing is necessary to determine the amount of attorneys fee.

15 USC § 15 provides that a person who has been injured by violation of the anti-trust laws can sue and recover treble damages and the costs of suit, including a reasonable attorneys fee. This constitutes statutory authority for the allowance of attorneys fees at the trial stage of an anti-trust action but cannot, in the absence of express language to that effect, be interpreted to authorize the allowance of attorneys fees at the appellate stage of the proceedings.

The allowance of attorneys fees is a matter within the discretion of the appellate courts. The United States

Court of Appeals for the Ninth Circuit in the case of *Twentieth Century Fox* v. *Goldwyn*, 328 F 2d 190 (1964) and *Fowler Manufacturing Company* v. *Gorlick* (August 15, 1969), both of which were anti-trust cases, awarded the prevailing party attorneys fees on appeal. These fees were in addition to those granted by the trial court. In *Washington State Bowling* v. *Pacific Lanes*, 356 F 2d 371, the same court had before it an unopposed motion for allowance of attorneys fees but declined to grant them because it felt the award at the trial stage was adequate.

Plaintiff's application for additional attorneys fees should have been made to the appellate courts. The judgment of the Supreme Court is binding and the issue of attorneys fees cannot now be reopened in the District Court in the absence of an express direction in the mandate that such matter should be considered as part of the costs.

Plaintiff does not cite any authority to support his contention that the District Court is the proper court to award additional attorneys fees on appeal. His reasoning in support of this contention is that the Supreme Court must have intended that the District Court award an additional attorneys fee because attorneys fees are part of the costs and the Supreme Court reversed the case "with costs" to the District Court. This reasoning fails because the Supreme Court mandate clearly specifies the costs and no mention is made of attorneys fees.

Plaintiff's application is denied.

Dated this 27 day of October, 1969.

/s/ Robert C. Belloni
United States District Judge

APPENDIX D

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 624

CLYDE A. PERKINS, *Petitioner*,

v.

STANDARD OIL COMPANY OF CALIFORNIA

ON WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

THIS CAUSE came on to be heard on the transcript of the record from the United States Court of Appeals for the Ninth Circuit and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the said United States Court of Appeals in this cause be, and the same is hereby, reversed with costs; and that this cause be, and the same is hereby, remanded to the United States District Court for the District of Oregon with directions to reinstate its judgment.

It is further ordered that the said petitioner, Clyde A. Perkins, recover from the Standard Oil Company of California Ten Thousand Nine Hundred and Sixty Dollars and Fifty-nine Cents ($10,960.59) for his costs herein expended.

June 16, 1969

Clerk's costs	$ 150.00
Printing of record	10,810.59
Total	$10,960.59

A true copy
Test:

/s/ JOHN F. DAVIS
Clerk of the Supreme Court
of the United States

FILED
MAY 28 1970
JOHN E. DAVIS, CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1969

Nos. 1507, 1556

CLYDE A. PERKINS,
Petitioner,

vs.

STANDARD OIL COMPANY OF CALIFORNIA,
Respondent.

BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

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In the Supreme Court
OF THE
United States

October Term, 1969

Nos. 1507, 1556

Clyde A. Perkins,
Petitioner,
vs.
Standard Oil Company of California,
Respondent.

BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

PRELIMINARY STATEMENT

This case does not present any important or novel questions. The Court of Appeals, in conformity with its past practice and the practice in other circuits, granted petitioner's application for attorneys' fees as costs on appeal before it. The Court also determined, in accord with long established authority, that the lower courts could not add additional costs to those already specified in this Court's mandate in prior proceedings.

STATUTE INVOLVED

The pertinent portion of section 4 of the Clayton Act (38 Stat. 731; 15 U.S.C. § 15) provides that a successful litigant may, in addition to damages, recover "the cost of suit, including a reasonable attorney's fee."[1]

QUESTION PRESENTED

The question stated by petitioner (Pet. in No. 1507, p. 2; Pet. in No. 1556, p. 2[2]) is not accurate. The Court of Appeals did not rule that the lower courts lacked authority to make an award of attorneys' fees as costs on appeal. To the contrary, the Court of Appeals expressly held that it had such authority and it made an award to petitioner for services rendered before it (Appx. A to Pet. in No. 1507, p. 2a; Appx. C to Pet. in No. 1556, p. 6a).

With respect to the application for an additional award of attorneys' fees as costs in this Court, petitioner has ignored the fact that the Court's mandate expressly

---

[1] In full text, section 4 of the Clayton Act provides:

"That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee" (38 Stat. 731).

[2] Petitioner has filed two petitions for certiorari—one from the Court of Appeals' decision awarding attorneys' fees as costs in that Court and denying the application for attorneys' fees as additional costs in this Court (No. 1507 in this Court) and one from the dismissal of the appeal from the district court's decision which denied petitioner's applications in that court for fees as costs in both the Court of Appeals and this Court (No. 1556 in this Court). Since the questions and points raised in both petitions are the same, this brief is filed in opposition to both petitions.

specified the costs to be awarded to petitioner for proceedings in this Court (Appx. D to Pet. in No. 1507, p. 13a; Appx. D to Pet. in No. 1556, p. 7a). Both the district court and the Court of Appeals found that they had no authority to alter or amend the award of costs made by this Court (Appx. A, C to Pet. in No. 1507, pp. 1a-2a, 12a; Appx. B, C to Pet. in No. 1556, pp. 4a, 5a-6a). Hence, the question is: when this Court's mandate expressly specifies the costs to be awarded on appeal, do the lower courts have authority to add to those awarded costs?

STATEMENT OF CASE

After satisfaction of a judgment of $1,298,213.71, including attorneys' fees in the amount of $289,000, petitioner applied to both the district court and the Court of Appeals for additional attorneys' fees as costs in appellate proceedings both in the Court of Appeals and in this Court. The district court denied petitioner's application and the Court of Appeals granted petitioner an award of attorneys' fees for services rendered before it (Appx. A, C to Pet. in No. 1507; Appx. B, C to Pet. in No. 1556). The Court of Appeals subsequently dismissed petitioner's appeal from the district court's decision (Appx. A to Pet. in No. 1556). Petitioner questions these decisions only insofar as they deny him an award of attorneys' fees as costs in this Court.

Both the district court and the Court of Appeals pointed out (Appx. A, C to Pet. in No. 1507, pp. 1a, 11a; Appx. B, C to Pet. in No. 1556, pp. 3a, 5a) that this Court's mandate was not silent as to costs, but, on the

contrary, expressly specified the costs to be awarded to petitioner, namely:

> "It is further ordered that the said petitioner, Clyde A. Perkins, recover from the Standard Oil Company of California Ten Thousand Nine Hundred and Sixty Dollars and Fifty-nine Cents ($10,960.59) for his costs herein expended.
>
> "'June 16, 1969
>
> "'Clerk's costs $ 150.00
> "'Printing of record 10,810.59
>
> Total $ 10,960.59'"

(Appx. D to Pet. in No. 1507, p. 13a; Appx. D to Pet. in No. 1556, p. 7a).

Both courts held that they could not properly alter the award of costs made by this Court (Appx. A, C to Pet. in No. 1507, pp. 1a-2a, 12a; Appx. B, C to Pet. in No. 1556, pp. 4a, 5a-6a).

ARGUMENT

Contrary to petitioner's assertions (Pet. in No. 1507, pp. 2, 6; Pet. in No. 1556, pp. 2, 4-6), the Court of Appeals did not hold that lower courts lack authority to award attorneys' fees for services rendered in appellate proceedings. In fact, the Ninth Circuit has followed the salutary practice that attorneys' fees are to be awarded by the court best in the position to determine the value of the services rendered, i.e., the panel which heard the proceedings (e.g., *Raugen, Inc. v. Sterling Nelson & Sons* (9 Cir. 1965) 351 F.2d 851, 863; *Twentieth Century Fox Film Corporation v. Goldwyn* (9 Cir. 1964), 328 F.2d 190,

222, certiorari denied (1964) 379 U.S. 880; *American Crystal Sugar Co. v. Mandeville Island Farms* (9 Cir. 1952) 195 F.2d 622, 626). Thus, in granting petitioner's application for fees for services rendered before it, the Court of Appeals noted that its action was "consistent with our general practice to act upon such applications instead of referring them to the trial court for determination" (Appx. A. to Pet. in No. 1507, p. 2a; Appx. C to Pet. in No. 1556, p. 6a).[3]

There is therefore plainly no conflict with the cases cited by petitioner (Pet. in No. 1507, pp. 5, 6, 8; Pet. in No. 1556, pp. 5, 6, 7) which hold either that the district court has discretion under the statute to award attorneys' fees as costs in proceedings before it (*Montague & Co. v. Lowry* (1904) 193 U.S. 38, 48) or that, under appropriate circumstances, the statute allows an award of attorneys' fees as costs in appellate proceedings (*American Can Co. v. Ladoga Canning Co.* (7 Cir. 1930) 44 F.2d 763, 772,

[3]The Court of Appeals also noted that "[w]here, however, we have directed further proceedings, we have on occasion referred this matter to the district courts", citing *United States v. Carter*, (9 Cir., 1959) 272 F.2d 363 (Appx. A to Pet. in No. 1507, p. 2a, ftn. 1; Appx. C to Pet. in No. 1556, p. 6a, ftn. 1). This, too, is consistent with the practice in other circuits (see, e.g., *Osborn v. Sinclair Refining Company* (D.Md. 1962) 207 F.Supp. 856, 864, where a district court awarded damages and attorneys' fees after reversal, pursuant to directions from the Court of Appeals to determine "what items * * * are recoverable" (4 Cir. 1960) 286 F.2d 832, 840).

certiorari denied (1931) 282 U.S. 899).[4]

The Court of Appeals did not pass on the question whether a lower court may award attorneys' fees for work done in this Court if the mandate does not include a direction as to costs. Instead, the Court pointed out that the mandate here in question expressly specified the costs to be awarded which were "enumerated both as to item and amount" (Appx. A to Pet. in No. 1507, p. 1a; Appx. C to Pet. in No. 1556, p. 5a). It has been long settled that when the costs to be awarded are specified:

> "* * * the purpose to authorize such costs [attorneys' fees] and to make such allowance should be clearly expressed in the decree.
>
> * * * * * *
>
> "The mandate required the execution of the decree. The District Court could not vary it or give any further relief" (*Kansas City So. Ry. v. Trust Co.* (1930) 281 U.S. 1, 10, 11).

---

[4]Petitioner also erroneously relies (Pet. in No. 1507, p. 6; Pet. in No. 1556, p. 6) upon two district court decisions, neither of which conflicts with the decisions below. In the first of these decisions, the district court awarded damages and attorneys' fees (*Osborn v. Sinclair Refining Company* (D.Md. 1962) 207 F.Supp. 856, 864) after reversal, pursuant to directions from the Court of Appeals to determine "what items * * * are recoverable" ((4 Cir. 1960) 286 F.2d 832, 840). In the second decision upon which petitioner relies, the district court had certified certain interlocutory orders for an interlocutory appeal while retaining jurisdiction to render a judgment for damages (*Trans World Airlines, Inc. v. Hughes* (S.D.N.Y. 1963) 32 F.R.D. 604, 608). After the determination of the interlocutory appeal (*Trans World Airlines, Inc. v. Hughes* (2 Cir. 1964) 332 F.2d 602), the district court entered its judgment for damages (*Trans World Airlines, Inc. v. Hughes* (S.D.N.Y. 1969) 308 F.Supp. 679) and thereafter awarded costs, including attorneys' fees (*Trans World Airlines, Inc. v. Hughes* (S.D.N.Y. 1970) 1970 Trade Cases, ¶ 73,142).

This is but an application of the general rule that "an inferior court has no power or authority to deviate from the mandate issued by an appellate court" (*Briggs v. Pennsylvania R. Co.* (1948) 334 U.S. 304, 306). As petitioner admits (Pet. in No. 1507, p. 7), in every case upon which he relies, the question of costs was left open by the mandate.[5] The Court of Appeals' refusal to alter the award of costs made by this Court was therefore correct.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petitions for writs of certiorari should be denied.

Dated in San Francisco, California, May 26, 1970.

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[5] Similarly, if attorneys' fees are not recoverable as costs pursuant to statute but rather are subject to separate equitable proceedings, a mandate specifying costs does not cover attorneys' fees (*Sprague v. Ticonic Bank* (1939) 307 U.S. 161, 164, 168).

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Nos. 1507 & 1556

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

CLYDE A. PERKINS, *Petitioner*,

v.

STANDARD OIL COMPANY OF CALIFORNIA, *Respondent*.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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---

REPLY BRIEF FOR PETITIONER

These cases involve applications under Section 4 of the Clayton Act, 15 U.S.C. § 15, for "a reasonable attorney's fee" for legal services performed on behalf of petitioner in this Court, resulting in reinstatement of a jury verdict improperly set aside by the Ninth

Circuit. *Perkins* v. *Standard Oil Co. of California*, 395 U.S. 642 (1969). Both the district court (Pet. 1556) and the court of appeals (Pet. 1507) refused to entertain Perkins' applications, holding that they lacked jurisdiction to consider the matter.

The essence of Standard's position is that the decisions below "followed the salutary practice that attorneys' fees are to be awarded by the court best in the position to determine the value of the services rendered, i.e., the panel which heard the proceedings" (Br. in Opp., p. 4). We would agree that if the lower courts are deemed not to have jurisdiction over the matter, this Court should make an appropriate award (see Pet. 1507, p. 9). It is our position, however, that the district court is the proper forum to conduct a hearing and pass upon the application in the first instance, and that the courts below erred in ruling that it lacked jurisdiction to do so.

(1) Standard does not controvert our contentions that compensation for appellate legal services is properly includable in an award of attorneys' fees under Section 4 of the Clayton Act (Pet. 1507, p. 5); that failure to make such an award undercuts the purpose of the statute to compensate successful private antitrust plaintiffs for "*all* the legal services necessary to recover their damages" (Pet. 1507, p. 6) (emphasis added); and that such awards are a matter of right pursuant to statutory mandate, not judicial discretion (Pet. 1556, p. 6). Indeed, Standard says not one word in defense of the district court's ruling that Section 4 "cannot . . . be interpreted to authorize the allowance of attorneys fees at the appellate stage of the proceedings" (Pet. 1507, p. 11a)—a ruling directly contrary to the holding of *American Can Co.* v. *Ladoga*

Canning Co., 44 F.2d 763, 772 (7th Cir. 1930), *cert. denied*, 282 U.S. 899 (1931) (see Pet. 1556, pp. 5-6).

(2) Standard's sole argument is that since this Court's mandate "expressly specified the costs to be awarded to petitioner," and did not include attorneys' fees, the mandate precluded an award of attorneys' fees for the services performed in this Court (Br. in Opp., pp. 3-4). Standard suggests that a different result might be had where "the mandate does not include a direction as to costs" (Br. in Opp., p. 6). The basic fallacy in this argument is that, under Rule 57 of the Revised Rules of this Court, the costs awarded in the *Perkins* mandate ("Clerk's costs" and "Printing of record," see Pet. 1507, p. 13a) are automatically awarded by the clerk in each case where this Court reverses a lower court judgment, unless the Court specifically orders otherwise.[1]

We submit that the rule's provision for the award of filing fees and record printing costs cannot reasonably be interpreted to preclude a hearing on an application for attorneys' fees pursuant to statutory au-

---

[1] Rule 57 provides as follows in pertinent part:

> 2. In cases of reversal or vacating of any judgment or decree by this court, costs shall be allowed to the appellant or petitioner, unless otherwise ordered by the court. . . .
>
> * * * *
>
> 3. The cost of printing the appendix in this court is a taxable item. The cost of printing briefs, motions, petitions, and jurisdictional statements is not a taxable item.
>
> * * * *
>
> 6. When costs are allowed in this court, it shall be the duty of the clerk to insert the amount thereof in the body of the mandate, or other proper process, sent to the court below, and annex to the same the bill of items taxed in detail. . . .

thorization, and Standard cites no case so holding. This is particularly true where, as here, Perkins had no right to apply for appellate attorneys' fees until this Court's judgment was entered (Pet. 1506, pp. 7-8)—another point not disputed by Standard. As we note in the petition in No. 1507 (p. 7), in cases where this Court has reinstated private antitrust judgments it uniformly has not mentioned attorneys' fees in its mandates, leaving the question open for consideration by the lower courts. Standard erroneously states that in those cases "the question of *costs* was left open by the mandate" (Br. in Opp., p. 7 (emphasis added)). On the contrary, there, as here, "costs" were awarded, but attorneys' fees were left open. See, *e.g., Hanover Shoe, Inc.* v. *United Shoe Mach. Corp.*, Nos. 335 & 463, O.T. 1967, mandate dated June 17, 1968 ("Clerk's costs —$150.00, Printing of record—$7339.50"). To the same effect is *Sprague* v. *Ticonic National Bank*, 307 U.S. 161 (1939), where, in a non-antitrust equity proceeding, it was held that the specification of costs in appellate court mandates did not preclude a subsequent award of attorneys' fees by the district court. The Court, speaking through Mr. Justice Frankfurter, stated that since attorneys' fees had not been directly in issue before the appellate courts, their disposition by the mandates of those courts (*id.*, at 168)—

> could be implied only if a claim for such costs was necessarily implied in the claim in the original suit, and its failure to ask for such costs an implied waiver. These implications are repelled by the basis on which such costs are granted. They are not of a routine character like ordinary taxable costs; they are contingent upon the exigencies of equitable litigation, the final disposition of which in its entire process including appeal place such

> a claim in much better perspective than it would have at an earlier stage.[2]

(3) Had this been a case in which a jury verdict was erroneously set aside by the district court, and no hearing on trial attorneys' fees was held; the court of appeals affirmed; and this Court reinstated the jury verdict, Perkins unquestionably would have been entitled to a hearing in the district court on an application for attorneys' fees covering both trial and appellate services. See *Trans World Airlines* v. *Hughes*, 1970 Trade Cases ¶ 73,142 (S.D.N.Y. 1970); *Osborn* v. *Sinclair Refining Co.*, 286 F.2d 832 (4th Cir. 1960), 207 F.Supp. 856, 864 (D.Md. 1962).[3] Perkins should not be penalized, with his award of reasonable attorneys' fees lessened, because at the trial (in 1963) the district court reached the correct result and only the

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[2] *Kansas City Southern Ry.* v. *Guardian Trust Co.*, 281 U.S. 1 (1930), another non-antitrust equity case relied upon by Standard (Br. in Opp., p. 6), is not to the contrary. There, this Court merely held that failure to appeal from a court of appeals' decision—rejecting "suggestions" for attorneys' fees made originally to it—barred a "subsequent application" therefor in the district court. See *Ticonic*, *supra* at 168 fn. 7.

[3] In *Osborn* the district court awarded appellate attorneys' fees without an express direction from the court of appeals—a result in conflict with the decisions below. The *Osborn* appellate court's only direction was for further hearings on *damages*, remanding for (286 F. 2d, at 840)—

> additional evidence on the question of damages in the period before as well as after the termination of the lease. The District Court should then determine what items, if any, are recoverable.

Standard quotes the " 'what items * * * are recoverable' " language out of context in suggesting that the court of appeals expressly covered attorneys' fees in its remand order (see Br. in Opp., pp. 5 fn. 3, 6 fn. 4).

Ninth Circuit erred by setting aside the jury verdict on a rationale characterized by this Court as "wholly an artificial one . . . completely unwarranted by the language or purpose of the [Robinson-Patman] Act." 395 U.S. 642, 647.

CONCLUSION

The petitions for writs of certiorari should be granted.

Respectfully submitted,

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June 1970